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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 456

IN THE MATTER OF THE APPLICATION

of

VERNON MURPHY,

Petitioner,

v.

LEO A. LARKIN, Corporation Counsel of the City of New York, THEODORE H. LANG and GEORGE GREGORY, JR., constituting the Municipal Civil Service Commission of the City of New York, ARTHUR C. FORD, EDWARD C. McGUIRE and HERBERT M. ROSENBERG, constituting the Board of Water Supply of the City of New York, and ABRAHAM D. BEAME, Comptroller of the City of New York,

Respondents.

PETITIONER'S REPLY

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PETITIONER'S REPLY

Only one reiterated statement in Mr. Larkin's brief warrants reply.

(a)

At page 4, Mr. Larkin states that "persons appointed . . . without examination . . . do not obtain tenure under New York law . . ."

This is not so. That petitioner was appointed to the competitive class is certain. The New York Constitution (Article V, Sec. 6) provides for competitive examination only "as far as practicable"; the statute thereunder (CSL* 44) which defines the competitive class, again uses the words "for which it is practicable" in respect of examinations; the New York Court of Appeals in *Rohr* v. *Kenngott*, 288 N. Y. 97 (1942); *Ricker* v. *The Village of Hempstead*, 290 N. Y. 1 (1943) and *Purcell* v. *Kaplan*, 12 N. Y. 2d 252 (1963), specifically held that persons who nexer took an examination were entitled to tenure; Rule V-1X-10 (Petition, p. 5) under which petitioner was appointed is a "competitive class" rule; the Civil Service Commission certified (A-28) a resolution that a competitive examination to fill the position to which petitioner was appointed was "impracticable"; finally, the Appellate Division stated:

> ". . . The conclusion that petitioner was lawfully appointed to a permanent position in the competitive class."

and the Court of Appeals affirmed without opinion.

No one does, or could, question that petitioner's appointment was permanent. The salary was on an annual basis and the nature of the position was such that permanence was clearly intended. Petitioner's upgrading (A-16) to the title of "Principal Attorney," is conclusive.

Unless an appointment under Rule V.IX.10 includes tenure the last sentence in the Rule, which provides that no person appointed thereunder "shall be eligible for transfer or assignment to work within the City", is without meaning.

Quite obviously the intention of the rule makers was to preclude the possibility that a person, who had taken no

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* New York Civil Service Law.

competitive examination, can be appointed to a position outside of the City, thus given tenure, and then reassigned to a position within the City of New York.

Moreover, it is perfectly clear, that the city whenever it has recruitment problems is continuously appointing persons who have never taken a competitive examination to the competitive class and granting them tenure for the practical reasons stated in *Young* v. *Trussell*, 42 Misc. 2d 108 and *Altman* v. *Lang*, 44 Misc. 2d 751. It has been forced to adopt such procedures in order to attract qualified personnel.

Nor has the New York Court of Appeals ever held that a competitive examination was an essential prerequisite to an appointment to a permanent position in the competitive class. None of the cases cited by respondents at page 4 of their brief so holds. *Koso* merely held that CSL 31, providing that suspensions for lack of work in a department shall be made "in inverse order of original appointment" related to the date of original permanent appointment and not to the date of prior temporary or provisional appointment; *Byrnes* determined only that an assistant corporation counsel, admittedly appointed to an "exempt" position, who was a veteran, was also a "deputy" and, therefore, not entitled to the protection of CSL 75-1(b); *Fink* merely held that an appointee to the "non-competitive" class could not acquire a right to an appointment in the competitive class because of a "custom" in her department; *Bressler* affirmatively holds that two employees who had never taken competitive examinations but whose positions were reclassified into the competitive class, were entitled to tenure and that a third employee who had performed similar duties was also entitled to the same protection even though she had never received the same title prior to reclassification; *Crehan* merely holds that upon transfer of a department permanent employees remain permanent and temporary employees remain temporary;

finally, *Rosenthal,* which never went to the Court of Appeals, actually holds only that, if there is no longer any work for an appointee to perform, he may be discharged without formality. However, the Appellate Division also delivered itself of dictum to the effect that an appointee under competitive Rule V.IX.8 (persons having unique scientific or professional qualifications) may be "taken out of the competitive class" and "*pro haec vice* placed in a non-competitive class," i.e., for the occasion of being discharged. We content ourselves with the observation that such dictum is as erroneous as the holdings which we here seek to bring before this Court.

Of course, we concede that the basis for the holding of the New York Court of Appeals in the instant case is not crystal clear. Since the Appellate Division found that petitioner was appointed to a permanent position in the competitive class and the Court of Appeals affirmed without opinion, we assume that the Court of Appeals fell into the same error as did the Appellate Division, i.e., through some judicial myopia it neglected to read and apply the plan provisions of CSL 75-1(a); or perhaps, in petitioner's case, it was content to let the result remain without concerning itself with the reason. In either event, it has denied due process and equal protection of the law to petitioner.

Certain it is that there is nothing in any opinion below suggesting that only persons who have passed a competitive examination may receive permanent appointment to the competitive class. If there were, such holding would be clearly erroneous.

Nor is there anything in either decision by the Appellate Division, nor in the action taken by the Court of Appeals, which purports to overrule the clear finding of the Appellate Division that petitioner was "lawfully appointed to a permanent position in the competitive class."

(b)

We do not contend that the facts in *Peters* v. *Hobby; Green* v. *McElroy,* or *Slochower* v. *The Board of Education* (Petition, p. 13—Opposing Brief, pp. 4, 5) are factually similar to this case. But the principle is the same. Neither by statute nor by judicial decision may a citizen be denied due process of law nor may he be singled out and denied equal protection of the law. CSL 75-1(a) provides that all persons who hold a permanent position in the competitive class have tenure and may not be discharged except upon charges and a hearing. Respondents and the New York Courts seem content to have this rule applied to everyone except petitioner.

Respectfully submitted,

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September 14, 1965.

END